

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**WP(C).No. 6532 of 2006(C)**

**1. TREESA IRISH, W/O.MILTON LOPEZ, AGED**

**... Petitioner**

**Vs**

**1. THE CENTRAL PUBLIC INFORMATION OFFICER,**

**... Respondent**

**2. THE APPELLATE AUTHORITY UNDER RIGHT**

**3. THE CENTRAL INFORMATION COMMISSION,**

**4. UNION OF INDIA, REPRESENTED BY THE**

**For Petitioner :SRI.M.R.HARIRAJ**

**For Respondent :SRI.T.P.M.IBRAHIM KHAN,ASST.S.G OF INDI**

**The Hon'ble MR. Justice S.SIRI JAGAN**

**Dated :30/08/2010**

**O R D E R**

S. Siri Jagan, J.

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W.P(C) No. 6532 of 2006

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Dated this, the 30th day of August, 2010.

**J U D G M E N T**

The question of law posed in this writ petition is as to whether  
valued answer sheets of an examination returned to a public  
authority by the examiner entrusted with the task of valuation, is  
information exempted from disclosure under any of the provisions of  
the Right to Information Act, 2005 after the results of the examination

are published. The question arises in the following set of facts:

2. The petitioner is a postman who appeared for the written examination for selection to the post of last grade officials in the Kerala Circle of the Postal Department of the Government of India on 24-4-2005. When results were published, the petitioner was informed that no one qualified in the examination from the Ernakulam Division. The petitioner applied for her mark list for the examination, which was supplied to her only after she filed O.A. No. 741/2005 before the Central Administrative Tribunal, Ernakulam Bench. From Ext P1 mark list, the petitioner learnt that she failed to obtain minimum marks in one of the three papers, she having scored only 37 marks for that paper. She scored 45 and 70 marks for papers I and II respectively. She therefore submitted Ext. P2 application before the 1st respondent-Central Public Information Officer of the Kerala Postal Circle, under Section 6 of the Right to Information Act, for a copy of the evaluated answer paper of paper III of the examination, in which she was shown as failed. She remitted the required fee for the same. By Ext. P3 dated 8-11-2005, the 1st respondent rejected her request, on the ground that no public interest is involved in the case. The petitioner filed Ext. P4 appeal before the 2nd respondent-Appellate Authority under the Right to Information Act, which was rejected by Ext. P5 order dated 30-11-2005, holding that disclosure of such nature will compromise the fairness and impartiality of the selection process and such disclosure does not justify the larger public interest. The petitioner filed Ext. P6

second appeal before the 3rd respondent-Central Information Commission, which was rejected by the Commission holding that such information is exempt from disclosure under Sections 8(1)(e) and 8(1)(j) of the Right to Information Act on the ground that the public authority is holding the information in fiduciary relationship and the information is purely a personal information, which has no relation to any public interest or activity. Aggrieved by those orders the petitioner has filed this writ petition seeking the following reliefs:

- "i. To quash Exhibits P3, P5 and P8 by the issuance of writ of certiorari, or other appropriate writ, order or direction.
- ii. To issue writ of mandamus or any other appropriate writ, order or direction commanding the respondent No.1 to grant a photocopy of the valued answer sheet of the petitioner in Paper III of the Last Grade Officials Examination held on 24.4.2005 forthwith.
- iii. Grant such other reliefs as may be prayed for and the court may deem fit to grant, and
- iv. Grant the costs of this writ petition.

3. The petitioner contends that there is no fiduciary relationship

between the authority conducting the examination and the examiner, who values the answer papers, and the finding to the contrary in Ext. P8 is on an incorrect understanding of the meaning of the expression "fiduciary relationship" occurring in Section 8(1)(e) of the Right to Information Act. The counsel for the petitioner takes me through the meaning given to the expression in various text books and elucidation of the meaning of that expression by various courts, in support of that contention. According to the petitioner, since the evaluation of the answer papers is for selecting the best among the candidates appearing in the examination, the same is a public activity and the information sought for is not a personal information coming within the purview of Section 8(1)(j). It is further contended that absence of public interest simpliciter is not a ground for rejection of request for information under Sections 8 and 9 of the Act.

4. A common counter affidavit has been filed by the 1st respondent on behalf of all the respondents and the Assistant Solicitor General appears for all the respondents also. The same seeks to support the impugned orders under Sections 8(1)(e) and 8(1)(j) of the Act.

5. A reply affidavit has been filed by the petitioner to refute the contentions in the counter affidavit, in which the propriety of the 3rd respondent, an independent statutory authority, being represented by the 1st respondent and filing of a common counter affidavit along with

the other respondents, has been questioned by the petitioner.

6. I have heard counsel on both sides. The Standing Counsel for the Public Service Commission, who incidentally appeared before me for admission of a writ petition on the same day when this case was argued, in which the same question was in issue, on being informed about the hearing of this case, submitted that a decision in this writ petition would affect the Public Service Commission, since similar requests for copies of answer papers of tests conducted by the PSC have been rejected by the PSC, in respect of which writ petitions are also pending and therefore, he also may be allowed to advance arguments on the question of law involved. The Standing Counsel for the State Information Commission appearing in that case against the Public Service Commission, has stated that the State Commission has taken a decision in the case of the PSC against them and therefore he also may be heard in the matter. Their requests were granted and they also argued the question of law involved in detail. I have considered the contentions of all counsel in detail.

7. At the outset I express my strong displeasure in the 3rd respondent being represented by the 1st respondent and the 1st respondent filing a counter affidavit on behalf of the 3rd respondent also, no action to cure which has been taken by the 3rd respondent, despite the petitioner pointing out the same in her reply affidavit. The

Central Information Commission is an independent statutory, quasi-judicial authority, whose interest is not common with the other respondents since the 3rd respondent has to often render decisions adverse to the other respondents. Therefore the 1st respondent could not have filed a counter affidavit on behalf of the Commission also. In fact the same counsel could not have represented the Commission and the other respondents. Here it may be noted that the State Information Commission is represented by a separate standing counsel in this court and they defend their orders independently.

Therefore the third respondent would do well in future to act accordingly. I leave it at that.

8. Right to information is not a mere statutory right created by the Right to Information Act. It is essentially a fundamental right guaranteed by the Constitution of India. Much before the enactment of the Right to Information Act, 2005, or its predecessor viz. the Freedom of Information Act, 2000, this constitutional right has been recognised and formulated by the Supreme Court of India in the celebrated decision of *State of Rajasthan V Raj Narain*, AIR 1975 SC 865. The renowned judge Justice K.K. Mathew had, in his inimitable style, eloquently stated the law on the subject thus, in paragraph 74 thereof:

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public Act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the freedom of speech, though not Absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security, see New York Times Co.V United States (1971) 29 Law Ed. 822 = 403 U.S. 713. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self interest or bureaucratic routine. The responsibility of officials to explain and justify their acts is the chief safeguard against oppression and corruption."

In the case of S.P. Gupta V Union of India, 1981 (Supp) SCC 87 (para 65), the Supreme Court again emphasised the need of openness in the government in the following words:



"65. The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rulers and once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government - an attitude and habit of mind. But this important role people can fulfil in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government."

The Right to Information Act, 2005 only establishes the machinery for supply of information when a citizen exercises his fundamental right to receive information in tune with the above constitutional principles, as is clear from the preamble to the Act, which reads thus:

An Act to provide for setting out the practical regime of right

to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

Whereas the Constitution of India has established democratic Republic;

And Whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

And Whereas revelation of information in actual practice is likely conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And Whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, Therefore, it is expedient to provide for furnishing

certain information to citizens who desire to have it.

Section 3 of the Act lays down that

"Subject to the provisions of this Act, all citizens shall have the right to information."

Of course, the Act recognises certain exceptions on sound principles, commensurate with the declaration in the preamble itself. Those are contained in Sections 8 and 9 of the Act. But since supply of information to those who desire to have it is the rule, these exceptions have to be construed strictly to the letter.

9. Since the respondents seek to justify refusal of the information requested for by the petitioner, claiming exemption under Section 8(1)(e) and 8(1)(j), I shall extract those provisions for easy reference:

8. Exemption from disclosure of information. -(1)

Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, -

a)     xx   xx   xx   xx   xx   xx   xx

b)     xx   xx   xx   xx   xx   xx   xx

c)    xx   xx   xx   xx   xx   xx   xx

d)    xx   xx   xx   xx   xx   xx   xx

e) information available to a person in his fiduciary  
relationship, unless the competent authority is  
satisfied that the larger public interest warrants  
the disclosure of such information;

f)    xx   xx   xx   xx   xx   xx   xx

g)    xx   xx   xx   xx   xx   xx   xx

h)    xx   xx   xx   xx   xx   xx   xx

i)    xx   xx   xx   xx   xx   xx   xx

j) information which relates to personal information  
the disclosure of which has no relationship to any  
public activity or interest, or which would cause  
unwarranted invasion of the privacy of the  
individual unless the Central Public Information  
Officer or the State Public Information Officer or  
the appellate authority, as the case may be, is  
satisfied that the larger public interest justifies the

Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person.

10. The first question to be considered, therefore, is as to whether the public authority and the examiner engaged by the public authority to value the answer papers of the candidates, who have appeared for the examination conducted by the public authority, have a fiduciary relationship in relation to the valued answer sheets of the candidates, so as to deny the candidate a copy of the answer paper, claiming exemption from disclosure under Section 8(1)(e). The term 'fiduciary relationship' is not defined in the Act or any other statute for that matter. Therefore we have to rely on the general, accepted legal connotation of the term for deciding the issue.

11. Black's Law Dictionary, Seventh Edition (1999), edited by Mr. Bryan A. Garner gives the following meaning for the term:

"fiduciary relationship. A relationship under which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships - such as trustee-beneficiary, guardian-ward, agent-principal and attorney-client - require the highest duty of care. Fiduciary relationship usually arise in one of four situations: (1) when one person places trust in the

faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice on matters falling within the scope of the relationship, or (4) when there is a relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

12. The Corpus Juris Secundum gives the following meaning for the expression, which is stated to be based on various decisions on the subject:

" The term "fiduciary relation" has reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, influence over each other, and implies a condition of superiority of one of the parties over the other; but in relation with undue influence, it does not necessarily imply acts which the law deems fraudulent.

.....  
.....

When it exists. What constitutes a fiduciary relationship is often a subject of controversy. The relationship may exist under a

great variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence, in cases when confidence is reposed on one side and there is resulting superiority and influence on the other, in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed."

13. The Dictionary of Law by L.B. Curzon (fourth edition)

gives the following meaning for the word 'fiduciary':

"fiduciary. Involving trust or confidence. e.g., as describing the relationship between a trustee and beneficiary. In general, where a fiduciary relationship between parties to a transaction exists, undue influence leading to some agreements, such as contract may be presumed."

14. The meaning of the term has been considered by a Division Bench of this Court in Sunitha V Ramesh, 2010 (3) KLT 501, in the context of husband-wife relationship, while doing which, the meaning of the expression given in some other text books were also noted. The Division Bench has held thus in paragraphs 19 to 21.

"19. We now come to the question whether husband-

wife relationship is one which can be described to be fiduciary relationship. We have already noted that there is no satisfactory and precise definition of the expression fiduciary relationship/capacity in any of the relevant statutes. Even in Francis (supra), the Court was obliged to consider the dictionaries and Law Lexicon. Black's Law Dictionary explains "fiduciary capacity" in the following words;

"One is said to act in a "fiduciary capacity" or to receive money or contract a debt in a "fiduciary capacity", when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit for the benefit of another person, as to when he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but also includes such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation and a public officer."

20. In Stroud's Judicial Dictionary, the expression

"fiduciary capacity" is described as follows-.

**FIDUCIARY CAPACITY.** An administrator who has received money under letters of administration and who is ordered to pay it over in a suit for the recall of the grant, holds it "in a fiduciary capacity" within Debtor's



Act, 1869 .....; so, of the debt due from an executor who is indebted to his testators estate which he is able to pay but will not.....; so...of moneys in the hands of a of a receiver....., or agent.....,or manager....., or moneys due on an account from the London agent of a country solicitor....., or proceeds of sale in the hands of an auctioneer....., or moneys in the compromise of an action have been ordered to be held on certain trusts ..... of partnership moneys received by a partner .....[Note. The period to be looked to is that of the act done.....]

Wharton's Law Lexicon refers to the expression "fiduciary" and explains the same in the following words:

"One who holds anything in trust. See Trust"

In Bouvier's Law Dictionary, "fiduciary relationship" is defined in the following words:

"What constitutes fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor or administrator, director of a corporation or society..... Medical or religious adviser,..... husband and wife ..... an agent who appropriates money put into his hands for a specific purpose, of investment, collector of city taxes who retains money officially collected,..... one who receives a note or

security for collection.....In the following cases debt has been held not a fiduciary one; a factor who retains money of his principal ..... an agent under an agreement to account and pay over monthly;.....one with whom general deposit of money is made."

(emphasis supplied)

21. We thus find that to understand the expression fiduciary capacity, we have to look at the nature of the relationship in the instant facts. At least in Bouvier's Law Dictionary, the husband and wife relationship is specifically referred to as a fiduciary relationship. All relationships which are built on mutual trust, dependence and confidence of a special variety can certainly be described to be fiduciary relationship for the purpose of S.51(c), according to us. Following the dictionaries, trustee, executor, administrator, director of a Corporation or society, Medical or Religious Adviser, husband and wife, ward and guardian, agent and principal etc. can safely be held to be fiduciary relationship for the purpose of S.51(c) C.P.C. We asked for precedents specifically on the point as to husband and wife relationship can be described to be a fiduciary relationship. Specific precedents on the point are not brought to our notice."

15. A Full Bench of the High Court of Delhi, in the decision of

Secretary General Supreme Court of India V Subhash Chandra Agarwal, L.P.A. No. 501/2009, while dealing with the question as to whether the Chief Justice of India holds information regarding the assets of judges of the Supreme Court in a fiduciary capacity, held thus:

"POINT 2: WHETHER THE CJI HELD THE "INFORMATION" IN HIS "FIDUCIARY CAPACITY"

95. The submission of the learned Attorney General is that the declarations are made to the CJI in his fiduciary capacity as pater familias of the judiciary. Therefore, assuming that the declarations, in terms of the 1997 resolution constitute "information" under the Act, yet they cannot be disclosed - or even particulars about whether, and who made such declaration, cannot be disclosed - as it would entail breach of a fiduciary duty by the CJI. He relies on Section 8(1)(e) to submit that a public authority is under no obligation to furnish "information available to a person in his fiduciary relationship". He argues that the voluntary information given by the judges is not information in the public domain. He emphasises that the resolution crucially states:

"The declaration made by the judges or the Chief Justice, as the case may be, shall be

confidential".

96. On the other hand, Mr. Prashant Bhushan argues that a fiduciary relationship is one that is based on trust and good faith, rather than on any legal obligation. The purpose for disclosing a statement of assets to the CJI is to foster transparency within the judiciary and is essential for an independent, strong and respected judiciary, indispensable in the impartial administration of justice. Where the judges of the Supreme Court act in their official capacity in compliance with a formal Resolution, it cannot be said that the CJI acts as a fiduciary of the judges and that he must, therefore, act in the interests of the judges and not make such information public. According to him, unless the information sought can be excluded on the basis of one of the exemptions under Section 8 of the Act, the same cannot be denied merely on the classification of a document or on a plea of confidentiality, if the document is otherwise covered by the Act.

#### FIDUCIARY RELATIONSHIP

97. As Waker defines it: "A 'fiduciary' is a person in a position of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He

may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, company promoters and directors, guardians, solicitors and clients and others similarly placed." [Oxford Companion to Law, 1980 p.469]

98. A "fiduciary relationship", as observed by Anantnarayanan, J., "may arise in the context of a jural relationship. Where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence." [See *Mrs. Nellie Wapshare v. Pierce Lasha & Co. Ltd.* (AIR 1960 Mad 410)]

99. In *Lyell v. Kennedy*, (1989) 14 AC 437, the Court explained that whenever two persons stand in such a situation that confidence is necessarily reposed by one in the other, there arises a presumption as to fiduciary relationship which grows naturally out of that confidence. Such a confidential situation may arise from a contract or a gratuitous undertaking, or it may upon previous request or undertaken without any authority.

100. In *Dale & Carrington Inv't. (P) Ltd. v. P.K. Prathapan*, (2005) 1 SCC 212 and *Needle Industries (India) Ltd. V. Needle Industries Newey (India) Holding Ltd.* (1981) 3 SCC 333, the Court held that the directors of the company owe fiduciary duty to

its shareholders. In *P.V. Sankara Kurup v. Leelavathy Nambier*, (1994) 6 SCC 68, the court held that an agent and power of attorney can be said to owe a fiduciary relationship to the principal.

101. Section 88 of the Indian Trusts Act requires a fiduciary not to gain an advantage of his position. Section 88 applies to a trustee, executor, partner, agent, director of a company, legal advisor or other persons bound in fiduciary capacity. Kinds of persons bound by fiduciary character are enumerated in Mr. M. Gandhi's book on "Equity, Trusts and Specific Relief" (2nd ed., Eastern Book Company)

"(1) Trustee,

(2) Director of a company,

(3) Partner,

(4) Agent,

(5) Executor,

(6) Legal Adviser,

(7) Manager of a joint family,

(8) Parent and child,

(9) Religious, medical and other advisers,

(10) Guardian and ward,

(11) Licensees appointed on remuneration  
to purchase stocks on behalf of government,

(12) Confidential transactions wherein confidence is  
reposed, and which are indicated by (a) Undue  
influence (b) control over property, (c) Cases of  
unjust enrichment, (d) Confidential information,  
(e) Commitment of job,

(13) Tenant for life,

(14) Co-owner,

(15) Mortgagee,

(16) Other qualified owners of property,

(17) De facto guardian,

(18) Receiver,

(19) Insurance Company,

(20) Trustee de son tort,

(21) Co-heir,

(22) Benamidar."

102. The CJI cannot be a fiduciary vis-a-vis judges of the Supreme Court. The judges of the Supreme Court hold independent office. And there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. In these circumstances, it cannot be held that the asset information shared with the CJI, by judges of the Supreme Court, are held by him in a capacity of fiduciary, which if directed to be revealed, would result in such breach of duty."

16. From the meanings as ascertained above, it is clear that 'fiduciary relationship', although arises out of a transaction involving



trust between two parties, it requires something more than mere trust to make the relationship fiduciary. It also cannot be equated with mere privacy or confidentiality. At the heart of fiduciary relationship lie reliance, de facto control and dominance. A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. The Canadian Courts have developed the following tests for determining whether fiduciary relationship has been established, viz.

- a) The fiduciary has the scope for the exercise of some discretion or power;
- b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
- c) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Based on the legal principles arising from the above discussion, I am inclined to add one more to the same viz.

- d) The fiduciary is obliged to protect the interests of the other party.

From the material available on the subject, I am satisfied that those

tests can be applied for deciding the question as to whether there is fiduciary relationship between two parties.

17. Now let us examine whether applying those tests, such a relationship exists between a public authority and an examiner engaged for the purpose of evaluating the answer papers of an examination conducted by that public authority. If such a relationship exists in that transaction, as to who, among the three entities involved viz. the public authority, the examiner and the candidate, is the fiduciary, and who is the beneficiary itself is not ascertainable with any amount of certainty. Before valuation it is the examiner, who is the dominant party, being in a position to exercise some discretion or power in the sense that he is the person to award marks to the candidate at his discretion and is in a position to influence the public authority in the matter of deciding as to who the public authority should select for appointment or declare as having passed the examination. Here the examiner is not requested to supply any information and therefore the question of his obligation as a fiduciary does not require to be considered. After evaluation, return of the valued answer papers to the public authority and publication of the results of the examination, neither of them is in a position to exercise any discretion or power on the other, except perhaps to keep the identity of the examiner confidential, which the public authority is free to do and in supplying copy of the answer paper that confidence

is not breached. Except in the matter of disclosure of identity of the examiner, the public authority cannot unilaterally exercise any power or discretion so as to affect the examiner's legal or practical interests. The examiner is not peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power, except in the matter of disclosure of his identity. The public authority is also not obliged to protect any other interest of the examiner except his identity. The etching of marks by the examiner in the answer paper cannot be said to be something entrusted by the examiner with the public authority in confidence or trust so as to generate a duty in the public authority to keep the same in confidence in a fiduciary capacity. It also cannot be held that by giving copy of the answer paper with the etching of marks thereon would reveal the identity of the examiner. Certainly it cannot be said the public authority is bound to protect the examiner from others finding out the method of valuation adopted by the examiner and the correctness of the marks awarded. On the other hand it is in the interest of transparency that such matters are disclosed to those whom the marks affect. The identity of the examiner is in any event severable under Section 10 of the Act and the answer paper can be disclosed to the candidate without disclosing the identity of the examiner. If at all there is a beneficiary in the transaction, it can only be the candidate, whose answer papers are entrusted to the examiner for evaluation, who himself is seeking copy of the answer paper. As such, after the publication of the results, no

fiduciary relationship can be attributed among the parties to the said transaction. In any event after the answer papers are returned to the public authority by the examiner, there is no fiduciary relationship between the public authority and the examiner.

18. The plea of fiduciary relationship as between the CBSE and an examiner engaged by them to evaluate answer papers of students has been examined by a Division Bench of the Calcutta High Court, in *University of Calcutta V Pritam Rooj*, AIR 2009 Calcutta 97, holding thus:

"77. The plea of fiduciary relationship, advanced by the CBSE has not impressed us. Fiduciary relationship is not to be equated with privacy and confidentiality. It is one where a party stands in a relationship of trust to another party and is generally obliged to protect the interest of the other party. While entrusting the examiner with the work of assessment/evaluation of an answer script there is no agreement between the examiner and the public authority that the work performed by the examiner shall be kept close to the chest of the public authority and shall be immune from scrutiny/inspection by anyone. At least something in this respect has been placed (sic before) us. Since the RTI Act has been enacted to promote transparency and accountability in the working of every public authority and for containing corruption, even if there be such

a clause in the agreement between the examiner and the public authority the same would be contrary to public (sic interest) and void. We have no hesitation to hold that even if there be any agreement between the public authority and the examiner that the assessment/ evaluation made by the latter would be withheld on the ground that it is confidential and an assurance is given in this respect, the same cannot be used as a shield to counter a request from an examinee to have access to his assessed/evaluated answer scripts and the RTI Act would obviously override such assurance. Having regard to our understanding of the meaning of the word 'fiduciary', there is little scope to hold that the etchings/markings made on answer scripts by an examiner are held in trust by the public authority immune from disclosure under the RTI Act. We find no force in such contention which, accordingly, stands overruled."

I am in respectful agreement with the conclusion reached by the Calcutta High Court in the above decision.

19. Therefore, I am of opinion that a fiduciary relationship cannot be read into the relationship between the public authority and the examiner engaged by the authority for evaluating answer sheets of a public examination conducted by the authority, so as to enable the public authority to deny copy of the valued answer paper to the candidate applying for the said information, claiming exemption from disclosure under Section 8(1)(e) of the Right to Information Act.

Hence, the respondents cannot deny the petitioner copy of his answer paper claiming exemption from disclosure of information under Section 8(1)(e) of the Right to Information Act.

20. Even apart from the same, Section 8(1)(e) does make information available to a person in his fiduciary relationship disclosable, if larger public interest warrants disclosure of such public information. I am of opinion that it is in the larger public interest to ensure transparency in the method of valuation of every public examination and to satisfy every candidate who appeared in the examination that his answer script has been valued properly, and non-disclosure of the information would be against the spirit of the Right to Information Act. Without the candidate knowing how his answers have been evaluated, he would not be able to seek his remedies against wrong evaluation appropriately, if the evaluation is wrong.

21. The 2nd question is as to whether the disclosure of the information in question is exempt under Section 8(1)(j). The scope of this section has been considered by me in the decision of Canara Bank V Central Information Commission, 2007 (3) KLT 550, thus:

"8. The next exemption claimed by the petitioner is on the ground that the information sought for by the second respondent relates to personal information pertaining to the employees of the

Bank, disclosure of which has no relationship with any public activity or interest of the Bank or its employees and it would cause unwarranted invasion of the privacy of the employees, details of whose transfers are requested for by the 2nd respondent. I am of opinion that if this contention on the basis of S. 8(1)(j) is accepted, it would in fact run counter to the very object of the Right to Information Act itself. In this connection I may extract the preamble to the Right to Information Act.

xx xx xx xx xx xx xx xx xx

In fact, if that contention is accepted, then information relating to any person in respect of his illegal activities, especially corruption or misconduct could be withheld on the basis of the said section which is not what is contemplated by the Right to Information Act. I am of opinion that the information mentioned in S. 8(1)(j) is personal information which are so intimately private in nature that the disclosure of the same would not benefit any other person, but would result in the invasion of the privacy of that person. In the present case, without the information requested for the 2nd respondent would not be in a position to effectively pursue his claim for transfer in preference to others. On the other hand, the disclosure of such information would not cause unwarranted invasion of privacy of the other employees in any manner insofar as that information is not one which those employees can keep to

themselves. If the 2nd respondent is to contest that the transfers made are in violation of his rights for preferential transfer, he necessarily should have the information which cannot be withheld from him by resort to S. 8(1)(j). More importantly, the proviso to the section qualifies the section by stating that information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person. By no stretch of imagination can it be held that the information requested for the 2nd respondent are information which can be denied to the Parliament and a State Legislature. In fact that effectively nullifies the impact of the main provision to a great extent. Therefore I do not find any merit in the contention based on S. 8(1)(j) also."

(Preamble has been omitted since it has been extracted in paragraph

8 hereinbefore)

The ratio of that decision equally applies to the information in question in this writ petition. The valued answer paper, if at all, can be a personal information relating to the candidate who has written the same. When the candidate applies for copy of the same, it cannot be denied to the candidate on the ground that it is personal information, insofar as, if that information would compromise anybody, it is the candidate himself/herself.

The conduct of the



examination for selection to the post of Last Grade officials is certainly a public activity and therefore the valuation of answer papers of that examination has relationship to a public activity of the department in the matter of selection to a higher post. A candidate writing an examination has a right to have his answer paper valued correctly and he has a right to know whether the same has been done properly and correctly. Both the public authority and the examiner have a public duty to get the valuation done correctly and properly, which is a public activity and duty. Therefore the supply of the copy of the answer paper, which is for enabling the candidate to ascertain whether the valuation of the answer paper has been done correctly and properly, has relationship to a public activity or interest. In this connection I may quote with approval certain paragraphs of the decision of the Division Bench of the Calcutta High Court in Pritam Rooj's case (*supra*) on this point.

"57. Quite apart, there is no merit in the submission that giving the examinees access to their answer paper would not serve any public interest. Disclosure of assessed/evaluated answer scripts would definitely be conducive to improvement of quality of assessment/evaluation. Examiners appointed by the WBBSE or the University are not their employees. They are beyond the disciplinary control of the public authorities. If there be any incident warranting penal action, it is open to the public authority not to engage the errant examiner again, but their accountability to the

respective public body in case of improper or unfair or negligent marking or provision for disciplining them has not been shown. The examiners while assessing scripts are in the position of Judges of the merits of the answers written. There is however limited scope for judging their performance. Without demeaning the examiners at all, it may be observed that if the examiners action is made the subject of public scrutiny it might ensure assessments that are fairer, more reasonable and absolutely free from arbitrariness and defects. Every person discharging public functions must be accountable to the people and there is no reason as to why the examiners who also discharge public duty should not be accountable. This would indeed be a big step towards making all concerned associated with the examination process accountable to the examinees as well as the public authority.

58. There is another significant aspect which needs to be noted. As soon as information becomes accessible an informed decision could be made by a potential litigant, initially dissatisfied with the marks awarded to him, before he takes a plunge to legal recourse. The time money and effort which are necessarily associated with litigations could be lessened/avoided once greater transparency is assured. Similarly greater transparency would mean correct, timely and legally sound decisions on the part of the public authorities and its functionaries and thereby the quality of governance, most likely would improve."

After referring to several decisions of the Supreme Court and one of the Calcutta High Court, wherein challenge against assessment of answer papers were repelled on the ground of sufficient material to prove defects in the valuation process were not produced by the petitioner, the Division Bench of the Calcutta High Court, in that decision, again held thus:

"64. It is understandable the allegations made in the respective petitions by the examinees alleging that either there was defective, arbitrary and partial assessment or answers written by them had not been examined properly consistent with the norms fixed by the examining body were not substantiated before the court by placing relevant materials leading the Court to decline relief to such examinees. In the event by dint of the regulations framed by the examining bodies the examinees are deprived are deprived of the opportunity to have inspection of their scripts, it would be impossible for them to project before the court the defects, the arbitrariness or the partiality in evaluation of the scripts by the examiner, if any, and therefore access to justice which has been held to be a human right by the Apex Court in its decision reported in (2007) 6 SCC 120 : AIR SCW 4609; Arunima Barua v. Union of India & ors. would be entirely frustrated. For the reasons aforesaid, there is no reason as to why the provisions of the RTI Act should not be interpreted in a manner which would lean towards

dissemination of information rather than withholding the same so as to provide scope to the examinees to place materials before the Court in support of allegations made in their petitions to avoid in limine dismissal."

Further, it may be noted that some of the Universities in Kerala have themselves adopted the practice of supplying copies of answer papers to candidates who request for the same. The same would also go to show that at least those Universities have accepted the fact that there is no fiduciary relationship between the University and the examiner to prevent supply of copies of the answer papers to candidates and conduct of examinations and valuation of answer papers are public activities.

22. Here, it is to be noted that Section 8 is qualified by a proviso which reads as follows:

".....provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

I am of the opinion that this proviso adds to the rigour against the right to claim exemption and in fact takes the sheen out of the main Section, making it all the more difficult for the public authority to claim exemption from disclosure of information under any of the

provisions of the main section. It does not require much racking of the brains to conclude that if a question is raised in the Parliament or the State Legislature regarding any irregularity or corruption in the valuation of the answer papers in this case, then certainly the answer papers cannot be denied to the Parliament and the State Legislature and therefore the respondents cannot deny the information to the petitioner as well, claiming exemption under Section 8(1)(j).

23. There is no provision anywhere in the Act to the effect that information can be refused to be disclosed if no public interest is involved. Of course in a case of personal information, if it has no relationship with any public activity or interest, the information officer has discretion to refuse to disclose the same, if the larger public interest does not justify disclosure of such information. But on the ground of lack of public interest involved alone, the public information officer cannot refuse to disclose the information, without a finding first that the information is personal information having no relationship to any public activity or interest. I am at a loss to understand how disclosure of the valued answer paper would compromise the fairness and impartiality of the selection process. If at all, it would only enhance the fairness and impartiality of the selection process by holding out to the candidates that anybody can ascertain the fairness and impartiality by examining the valued answer papers. In fact, an ideal situation would be to furnish a copy

of the answer paper along with the mark lists of the candidates so that they can satisfy themselves that the answer papers have been valued properly and they secured the marks they deserved for the answers written by them. Therefore the reason given in Ext P3, by the 1st respondent, is patently unsustainable.

#### 24. The Standing Counsel for the Kerala Public Service

Commission would advance an additional contention that in the decisions of the Supreme Court in Maharashtra State Board of Secondary and Higher Secondary Education and another V Parithosh Bhupeshkumar Sheth and others, (1984) 4 SCC 27, President, Board of Secondary Education, Orissa and another V D. Suvankar and another (2007) 1 SCC 603 and Secy. W.B. Council of Higher Secondary Education V Ayandas and others (2007) 8 SCC 242, the Supreme Court has frowned upon the practice of Courts summoning answer scripts for re-evaluation and directing re-assessment and in view of that general law declared by the Supreme Court, the public authority cannot be compelled to issue copies of answer papers, which would violate that general law. I am of opinion that as explained in paragraph 64 of the decision of the Calcutta High Court in Pritam Rooj's case (supra), those decisions themselves are reasons for taking the view that in order to enable the candidates to place proof before the courts to show the

illegality/irregularity in the valuation of the answer papers, supply of copies of the answer papers is essential, failing which they would not be able to drive home their contentions effectively, before the courts and the cases are likely to be dismissed on the ground of lack of sufficient material to prove their cases. Further, in those decisions, the right of a candidate to get copies of answer papers under the Right to Information Act was not an issue at all. In fact all the three cases had its origin in 2004 and before i.e. prior to the enactment of the Right to Information Act, in 2005. Even otherwise, in view of Section 22 of the Act, the law on the point in issue in those decisions cannot affect the right under the Right to Information Act. Section 22 reads thus:

"22. Act to have overriding effect. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923) and any other law for the time being in force or in any instrument having the effect by virtue of any law other than this Act."

If even the Official Secrets Act cannot override the Right to Information Act in 2005, no doubt any other law, general or otherwise, even those laid down by the Supreme Court while interpreting other legislations, cannot govern the rights of parties under the Right to Information Act, after 2005. Further even if the

Courts cannot compel the Universities to produce the answer paper and direct revaluation thereof, the right of the candidate to get the information under the Right to information, which in fact is a fundamental right cannot be denied to him. While dealing with that contention, I can't resist the temptation to quote an eloquent paragraph from the judgment of the learned single judge (Sanjib Banerjee, J), (a copy of which has been supplied by the learned Standing Counsel for the State Information Commission), which led to the Division Bench decision in Pritam Rooj's case (supra), dealing with the contentions on the basis of the decision of the Supreme Court in Parithosh Bhupeshkumar's case (supra) itself, which reads thus:

"77. Judicial discipline demands deference to precedents not only of the hierarchical superior but also of a forum of coordinate jurisdiction but it does not command a fawning obeisance on the deification of any precedent. As society progresses and aspirations rise, it shakes off the shackles that it invented in its infancy or adolescence. Marvels of yesterday become relics of today. If the Central Information Commission can rightfully aspire for a day when answer scripts would accompany the mark sheets, that there would be no facility for it today would not lead to the natural words and import of the said Act to be constricted by any concern for the immediate hardship and inconvenience. The umbra of exemptions must be kept confined to the specific provisions in that regard and no penumbra of a further body of exceptions may be conjured up by



any strained device of construction. In a constitutional democracy, every limb and digit of governance is ultimately answerable to the governed."

25. The Standing Counsel for the Public Service Commission also raises a contention that if all the candidates apply for copies of answer papers, it would disproportionately divert the resources of the public authority and therefore disclosure of the same is exempt under Section 7(9) of the Act. I am of the opinion that the said contention is misconceived. That Section reads thus:

"7. Disposal of request

.....  
.....

(9) An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question."

That Section does not even confer any discretion on a public authority to withhold information, let alone any exemption from disclosure. It only gives discretion to the public authority to provide the information in a form other than the form in which the information is sought for, if

the form in which it is sought for would disproportionately divert the resources of the public authority. In fact there is no provision in the Act to deny information on the ground that the supply of the information would disproportionately divert the resources of the public authority. Section 4 of the Act makes it compulsory on the part of a public authority to comply with the obligations prescribed therein including the obligation under sub section (1)(a), to 'maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through network all over the country on different systems so that access to such records are facilitated' and the obligation under sub section (1)(b), to publish within 120 days from the enactment of the Act the various particulars relating to the public authority described in clauses (i) to (xvii), the object of which is to facilitate easy supply of the information in their possession to those who apply for the same. Further under sub section 2 of section 4, 'it shall be a constant endeavour of every public authority to take steps in accordance with requirements of clause (b) of sub-section 1 to provide as much information suo motu to the public under regular intervals through various means of communications, including internet, so that the public have minimum use of resort to this Act to obtain information'. The difficulties a public authority may

encounter in the matter of supply of information are no grounds to deny the information, if that information is available and not exempted from disclosure. Whatever be the difficulties, unless the information is exempt from disclosure, the public authority is bound to disclose the same. The facts that the information is voluminous, if all candidates apply for the information with the available infrastructure it may not be possible to cope up with the request, the authority will have to depute additional manpower to collect and supply the information etc. are not reasons available to the public authority to deny information to a citizen who applies for the same. The public authority can only insist on reasonable fees for supply of the information as per rules prescribed for the same. As such, the flood gate theory sought to be pressed into service by the Standing Counsel for the Public Service Commission is not a defence against supply of information under the Right to Information Act.

26. Even otherwise it is idle for a public authority to assume that if answer papers are held to be information which the authority is liable to disclose, all the candidates who have written the examination would apply for copies of answer papers and it would be difficult to supply the information to all. Only those candidates dissatisfied with the results would apply for copies of the answer papers, which would be a small fraction of the total number, if the valuation is fair and

proper and if the valuation is largely unfair and improper, then it is in public interest that the truth should come out, whatever be the difficulties. Therefore unless the public authority has something to hide, they should not worry about those difficulties, which in any event are not likely to occur in the normal course. Therefore I do not find any merit in the contention of the learned Standing counsel for the PSC on that aspect also.

27. Next, the counsel points out that another learned single judge of this court has held in W.P.(C) No. 9445 of 2009 that there is a fiduciary relationship between a University and the examiner engaged by them for valuation of answer papers of students and the same has been followed by another learned single judge in a common judgment in W.P.(C) Nos. 33443/2007 & 6836/2009. I have gone through those decisions. First of all as I have already stated, Universities in Kerala have themselves started supplying copies of answer papers to candidates on request. Further, the finding in W.P.(C) No. 9445 of 2009 is in the context of a request by a third party for copy of answer paper of another candidate. In that decision there is no discussion on the various legal aspects of the issue. The only discussion on the point is in paragraph 15 which reads thus:

"15. University may not be treated as situated in a fiduciary relationship with the examinee. University is, no doubt, to discharge statutory functions and one of its functions is to conduct

examinations. But a person, who has been entrusted with the valuation of an answer script, by the University, enjoys a position of trust and there would come into existence a fiduciary relationship between the University and the valuer of the answer script, in the context of the valuation of the answer script of an examinee. I am of the view that since the information available to the University as regards the details of the valuation or revaluation of an answer script is information so available with the University which is placed in a fiduciary relationship with the person entrusted with the task of valuing such answer scripts, the disclosure of such information can be compelled only when the competent authority is satisfied that there is a larger public interest that warrants disclosure of such information."

As is clear therefrom, the learned judge simply assumed that there is fiduciary relationship without examining what is fiduciary relationship and how the relationship between the University and the examiner is fiduciary in character. That judgment does not examine the issue in the perspective in which I have done. Further as I have held, it is in the larger public interest to disclose the information in order to ensure proper valuation of answer papers by the examiners as has been realised by the Universities by adopting the practice of issuing copies of answer papers to those who applies for the same. Therefore the said judgment can be held to be rendered per incurium since the same is contrary to the legal principles involved as elucidated above

and the learned judge was ill-informed about the law applicable. The other two writ petitions were for direction to the PSC to produce the answer papers of the petitioners and to get the answer papers valued by an expert and in those decisions it was not necessary to decide the question as to whether the PSC was bound to supply the copies of the answer scripts on request. In that judgment also there is no discussion on the legal issues involved and there is only a passing reference to the earlier judgment. Those decisions can be held to be authority for what they actually decided. As such I am not satisfied that those decisions are precedents which I should either follow or differ from to refer the matter for consideration of a Division Bench.

28. I am of opinion that the eagerness of public authorities to limit the scope of the request for information under the Act arises out of its inertia,